inviolability of State immunities no less than those of the National Government, and, aside from their value from a legal standpoint, serve as protests against the view that obtains in some quarters that the Court is inclined to overlook the constitutional limitations that are of benefit to the States. Politically speaking, it could be wished that all the States would, for themselves, by proper legislation, follow the example set by the United States in establishing the Court of Claims, and permit themselves to be sued. But so long as the doctrine of State immunity from suit remains to any extent part of our law, the profession will be able to advise with some degree of satisfaction on the subject, now that its definite meaning has been at length evolved in the discussions and conclusions of the Supreme Court.

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A STRANGE DECISION BY THE UNITED STATES SUPREME COURT.

BY A JURIST.

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The Supreme Court of the United States has during all its existence enjoyed the confidence and respect of the public to a remarkable degree, and that confidence has been well deserved. Its decisions have been distinguished by great learning, careful investigation, and convincing reasoning. In almost all cases its judgments have met with immediate and general approval; yet it must be admitted, and it is admitted by the Court, that a mistake has sometimes occurred. The instances of mistake have been marvelously rare. Considering how great has been the burden imposed upon it, and the broad jurisdiction committed to it by the Constitution, it is a wonder that the Court has not much more frequently fallen into error. But the infrequency of mistakes naturally invites attention to one when it has been made, and especially when the consequences of the mistake are far-reaching and hurtful. One such, it is believed, the Court has quite recently made. It was in the decision of the case of *Hans against the State of Louisiana* (1890), 134 U. S. 1. The facts of that case, stated so far as it is necessary to state them, in order to exhibit what the Supreme Court has decided, were the following: Hans, a citizen of Louisiana, brought suit in the Circuit Court of the United States against the State of Louisiana to recover the amount of certain coupons for interest, annexed to bonds of the State, issued under the provisions of an act of the State Legislature, enacted in 1874. The bonds

and coupons were made payable to bearer. They were held by the plaintiffs; the coupons were past due and unpaid. By the act under which they were issued, the State contracted and agreed to pay the interest represented by the coupons semi-annually as the coupons matured. But this was not all. A subsequent Amendment of the State Constitution ordained as follows:

"The issue of said consolidated bonds, authorized by the General Assembly of 1874, at its regular session [the bonds above mentioned], is hereby declared to create a valid contract between the State and each and every holder of said bonds, which the State shall by no means and in no wise impair. The said bonds shall be a valid obligation of the State in favor of any holder thereof, and no court shall enjoin the payment of the principal or interest thereof, or the levy and collection of the tax therefor. To secure such levy, collection and payment, the judicial power shall be exercised when necessary. The tax required for the payment of the principal and interest of said bonds shall be assessed and collected each and every year, until said bonds shall be paid principal and interest; and the proceeds shall be paid by the Treasurer of the State to the holders of said bonds as the principal and interest shall fall due, and no further legislation or appropriation shall be requisite for the said assessment and collection, and for such payment from the treasury."

It is impossible to conceive of a contract more thoroughly binding and more solemnly ratified than the contract of the State with the holders of these bonds and coupons; yet in 1879 the State, by a new Constitution, ordained that the coupons of said bonds be and were thereby remitted, and that any interest taxes collected to meet said coupons were thereby transferred to defray the expenses of the State Government. By another article of the new Constitution, the previous Constitution and all Amendments thereto were declared to be superseded. All this was set forth in the complaint of the plaintiff, and it was further averred that the State claims that she is thus (by the operation of the last mentioned Ordinance) relieved from her contract with the holders of the bonds and from payment of the coupons, and has prohibited her officers against making payment, and has diverted the taxes collected for the payment of the interest, appropriating them to payment of the general expenses of the State.

The case of the plaintiff, therefor, as presented (so far as its subject matter was concerned) was undeniably and confessedly within the jurisdiction of the courts of the United States. It presented a question arising under the National Constitution. The ordinance of the State Constitution of 1879, was a plain violation of that provision of the National Constitution which forbids a State to make any law impairing the obligation of a contract. The ordinance not only impaired the obligation the State had assumed by her contract with the bond and coupon-holders, it repudiated the obligation. This the State did not attempt to deny, or even to justify. The defence set up in the Circuit Court was that the State could not be sued without her permission. This defence the Circuit Court sustained, and dismissed the case accordingly. It was then removed to the Supreme Court, where the judgment of dismissal given by

the Circuit Court has recently been affirmed. What has thus been decided is this—that a citizen of a State cannot sue the State of which he is a citizen, in our United States Court, to recover a debt due to him by the State, even though the case present a question arising under the Constitution of the United States, unless the State has given her consent that she may be sued. It is a grave decision. If it is correct, very serious consequences follow. Then that most important provision of the National Constitution, that no State shall make a law impairing the obligation of contracts, is inoperative in many cases. Every State may make contracts, and discharge herself at pleasure by a law of her own making. Thus the Constitution fails to secure one of the great benefits which its framers had in view, namely, the establishment of justice. That provision which prohibits State legislation impairing contracts, was intended to prevent such wrongs as are charged against the defendant State. Prior to the adoption of the Constitution, great injustice had prevailed in many of the States. Laws had been enacted totally changing existing contracts, and relieving debtors from the obligations they had assumed. It was a crying evil, and its existence was doubtless one of the causes that led to the formation and adoption of the Constitution. The prohibition has often been enforced in the United States Court, and it has done much to promote and maintain justice. Can it be now that a State may disregard it, so far as her contracts are concerned, and that there is no remedy? Does not the establishment of justice require that a State contract shall be maintained inviolable, quite as much as that the contracts of a natural person shall be?

Without further remarks in this line, and turning directly to the case under consideration, it is to be observed that the question before the Court was not whether a citizen of one State could sue another State. In *Chisholm* v. *Georgia* (1793), 2 Dallas (2 U. S.) 419, it was decided that he could, as the Constitution then was, though the State had not consented to be sued, and though the case presented no question arising under the Constitution or laws of the United States. That was because the Constitution expressly declared that the judicial power should extend to controversies between a State and the citizens of another State. It was not thought then that suits against a State were tacitly excepted. It was in consequence of that decision that the Eleventh Amendment was adopted. That Amendment has no applicability to the case now under consideration. It declares that the judicial power of the United States shall not be construed to extend to any suit at law or equity commenced or prosecuted against a State by "citizens of another State, or citizens or subjects of a foreign State." It leaves carefully untouched suits brought by "a citizen of a State against the State of which he is a citizen." This omission cannot be regarded as accidental or unmeaning. It was doubtless the supposed indignity of being subjected to suits brought by citizens of other States, or aliens that induced the proposal and adoption of this Amendment. It is unnecessary to say more of this. The Supreme Court does not rely upon it to sustain their decision in the *Hans* case. The sole ground upon which their opinion and judgment rest is, that no suit of a private citizen can be sustained against a State in a United States

Court in the absence of the State's consent, even though that person is a citizen of that State, and though the suit presents a question arising under the Constitution, or laws of the United States, or treaties. Is this ground tenable? It is confidently believed it is not. True, as said by the Court, it has often been laid down and acknowledged by the courts that a State cannot be sued without her consent. But these rulings always apply to suability in the State's own courts. It is admitted that a State cannot be compelled to allow the use of its courts to a private suitor against her. Many of the States, however, do allow such suits. The United States does partially, and so do most other foreign governments where the maintenance of justice is properly regarded. Moreover, the rule of denial of use of a State's courts by a suitor against a State has been derived from the usages of independent sovereignties abroad, and it is claimed as an attribute of sovereignty. But the States, since the adoption of the Constitution are sovereign only in a limited sense. The Constitution is the supreme law of the land, binding upon all the States, and controlling considerable State legislation, or, rather, prohibiting it. As between the United States and the States, the latter are only partially sovereign. Their courts are in some cases subordinate. If, however, it be conceded that there is no difference in this particular between the States and wholly independent sovereignties abroad which do not allow themselves to be sued in their courts by their subjects, there are other points of difference which are believed to be substantial. The relation of a State to the General Government must be considered. As already remarked, the Constitution of the United States is the supreme law of the land. It is the expression of the will of all the States, and all the legislators and judges—in fact, all officers of the State make oath to support it. The second section of the third article of that instrument declares that "the judicial power" (of the United States) "*shall extend to all cases in law or equity arising under this Constitution, the laws of the United States and treaties made.*" It is noticeable that this deposit of judicial power is as comprehensive as language can make it. It is exceedingly broad. It is *all* of it which has been conferred. There is no exception. It is not said all cases arising under the Constitution and laws, except cases in which a claim is prosecuted against a State. Nor is there anywhere in the Constitution any grounds for an implication of a possible exception.

Judicial power is the right to try and adjudicate a case, and *all* cases arising under the Constitution are declared to be subject to it. By the first section of the third article that power is vested in United States courts. How then it can be maintained that any power remains in a State to determine whether or not that power confided to United States courts, shall be exercised, it is impossible to see. How can it be that a State can enlarge or diminish, at its pleasure, the judicial power of the General Government? How can it be that the United States may not use *its own courts* without asking permission from any State? and use them to sustain its own Constitution?

There is another view of the subject which is equally, if not more, convincing. If it could be conceded that consent of a State is necessary to enable the courts of the United States to try and adjudicate such a case

as is described in the second section of the third article of the Constitution, above quoted, the question still remains whether the State has not practically given consent by coming into the Union, and adopting the Constitution. It is firmly believed she has. What does adopting the Constitution mean, if not consent to all its provisions? How can it be maintained that by their coming into the Union the States did not assent to all the limitations which the Constitution imposed upon them, and to the assumption and exercise of all the powers, judicial or other, which it conferred upon the General Government. Is not this assent as perfect and operative as if it had been given to each limitation and power in detail? It ought not to be doubted. The Constitution ought to be construed, if possible, so as to accomplish the great purposes for which it was framed, one of which was to protect the inviolability of contracts against adverse State legislation. For that, in part, United States Courts were provided, and jurisdiction assigned to them. It cannot be that a State, after having adopted the Constitution, and through its officers sworn to support it, can relieve herself from the obligations it imposes, by asserting that she never consented to have those obligations enforced against herself. An act of a State Legislature authorizing suits to be brought in United States Courts against the States would be a strange anomaly. It has not hitherto been supposed that a State can enlarge or restrain the jurisdiction of those Courts, because that jurisdiction is independent of State control, made so by the sovereign power of the people of the States. If what has been said is correct, the State of Louisiana has given an irrevocable consent that the Courts of the United States shall have the power and right to try and adjudicate all cases, without exception, arising under the Constitution and laws of the National Government, such as the case of *Hans*, even though she may not have consented to be sued in the State courts. In their recent decision, the Supreme Court seems to have overlooked the considerations now suggested. This must be regarded as unfortunate, for if it is settled that before a suit against a State can be instituted in a United States Court, to vindicate the Constitution (such a suit as that heretofore mentioned), there must be a consent of the State above and beyond that which is implied by the State's having come into the Union, one of the most valuable provisions of the Constitution is at the mercy of the State—the last barrier against State repudiation is swept away, and the rankest injustice is rendered easy and remediless.

IN GRANTING permission to reprint the above, the request for the name of its writer and for leave to print it, was courteously declined. Editorially, *The Independent* vouches for the writer as one of the best known and most experienced jurists in the country, and whose name would add great weight. J. B. U.